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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-738

ARISON SHIPPING COMPANY, et al., *Petitioners*

vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN SHIPPING LINES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

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No.

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vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN SHIPPING LINES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on May 30, 1973.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida dated May 30, 1973 appears as Appendix A, *infra,* and is reported at 280 So.2d 678 (1973). The opinion of the District Court of Appeal of Florida, Third District, dated October 18, 1972 appears as Appendix B, *infra,* and is reported at 268 So.2d 428 (1972).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on May 30, 1973. A timely petition for rehearing and motion to stay issuance of mandate was denied August 10, 1973. The order of the Supreme Court of Florida denying this petition appears as Appendix C, *infra,* and is unreported. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Florida Rules of Civil Procedure 1.610 and 1.620, which permit the appointment of a receiver without notice to the affected party despite the fact that notice could be easily given, operate as a deprivation of due process of law both on their face and as applied to the facts herein.

2. Whether an appellate court may, consistent with the demands of due process, determine a contested issue of fact without providing an opportunity for the presentation of evidence on that issue.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provision involved herein is section 1 of the Fourteenth Amendment which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Florida Rules of Civil Procedure, Rules 1.610 and 1.620, involved herein provide in relevant part:

Rule 1.610. *Injunctions*

"(a) *Issuance.* No injunction shall be granted until a complaint therefor is filed.

(b) *Temporary Injunction; Notice; Bond.* No temporary injunction shall be granted except after notice to the adverse party unless it is manifest from the allegations of a verified complaint or supporting affidavits that the injury will be done if an immediate remedy is not afforded and in such event the court may grant a temporary injunction until a hearing or further order of court . . ."

Rule 1.620. *Receivers*

"(a) *Notice.* The provisions of Rule 1.610 as to notice shall apply to applications for the appointment of receivers."

STATEMENT OF THE CASE

Petitioner Arison Shipping Company (hereinafter "Arison") and respondent Klosters Rederi A/S (hereinafter "Klosters") on October 8, 1969 entered into a joint venture agreement.[1] Klosters was to supply the vessels and Arison the shoreside services such as advertising, reservations and the like for Carribean ship cruises. The joint venture agreement set forth a formula for the sharing by Arison and Klosters of the profits and losses from this venture. Klosters was given the right to designate one member of Arison's board of directors and also used office space provided by Arison in Arison's Miami, Florida, main office.

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[1] This agreement replaced several previous agreements, the most recent of which was dated October 18, 1967.

On December 31, 1971, Klosters delivered a letter to Arison purportedly terminating for cause the joint venture agreement. Arison promptly replied in writing on January 3, 1972, vigorously denying the allegations that it was in breach of the agreement and demanding, pursuant to paragraph 16.1 of the agreement, that the parties arbitrate their differences. On January 27 Klosters answered Arison's January 3 arbitration demand by a letter reserving "its judgment as to whether or not its interests may be best served by arbitration or judicial proceedings."

Two days earlier Klosters' counsel had informed the accountants for Kloster that he intended on February 1, 1972 to petition for the appointment of a receiver to seize control of Arison's operations and assets.[2] Klosters' counsel fulfilled his prediction. On the morning of February 1, 1972, *without notice* to Arison, Klosters petitioned the United States District Court for the Southern District of Florida for the appointment of a receiver. This petition did not comply with the requirement of Rule 65(b)(2) of the Federal Rules of Civil Procedure that petitioner's counsel set forth the steps taken to contact the opposition. On that same day District Judge King entered an "Order To Maintain Status Quo"[3] and set the matter down for hearing for the following day.

Arison appeared at the hearing and contested the jurisdiction of the District Court on the grounds that

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[2] Klosters' accountants memorialized this conversation in an internal memorandum reproduced at Appendix D, *infra*.

[3] While so captioned, this order was a temporary restraining order entered pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

diversity of citizenship was lacking. District Judge King agreed and therefore vacated his order.

During a colloquy with Klosters' counsel and in the presence of Arison's counsel, Judge King stated he would permit Klosters to withdraw its federal court petition and refile the identical papers in a Florida state court. He even suggested that Klosters not change the cover page but merely file with the state court an explanation for the miscaptioning of the papers. Klosters' counsel gave no indication whatsoever that he intended to follow Judge King's suggestion.

Immediately after the conclusion of the federal court hearing on February 2, 1972, Arison filed a petition to compel arbitration in the Dade County Circuit Court (the "arbitration action") and served the arbitration petition upon the Klosters' officer who had testified for Klosters in the federal court action. Later that same day and after having been served in the arbitration action, Klosters acted upon Judge King's suggestion and filed in Dade County Circuit Court— again *without notice to Arison*— a petition seeking appointment of a receiver identical to that filed before Judge King (the "receiver action"). Klosters did not disclose to the Dade County Court that it had already been served with a petition to compel arbitration.[4] The Dade County Court granted Klosters' petition and appointed a receiver of Arison's assets and property without any prior notice to Arison.

Arison contested the appointment of the receiver without notice before the Dade County Court. On

[4] The Florida District Court of Appeals later characterized Klosters' stratagem as one which "bordered on sharp practice." *Arison Shipping Co.* v. *Klosters Rederi A/S*, 259 So.2d 784, 788 (Fla. Dist. Ct. App. 1972).

February 4, 1972, Arison took an expedited interlocutory appeal in the receiver action to the Florida Third District Court of Appeal. Point IV of this appeal sought vacation of the appointment of the receiver on the grounds that no prior notice had been given to Arison. The District Court of Appeal on March 28, 1972 upheld the appointment of the receiver. *Arison Shipping Co.* v. *Klosters Rederi A/S,* 259 So.2d 784 (Fla. Dist. Ct. App. 1972). Arison's petition for rehearing was denied on April 4, 1972.

On May 18, 1972, Arison in the receiver action filed a petition for a writ of certiorari with the Supreme Court of Florida. This petition in its entirety argued that the Florida Supreme Court should grant certiorari to review the fact that the trial court had appointed a receiver without prior notice to Arison. The Florida Supreme Court denied this petition on June 30, 1972; the certified copy of this order, which under Florida law is equivalent to mandate, was issued August 7, 1972.

At the same time the receiver action was traveling the appellate ladder in the Florida courts, Arison's petition to compel arbitration was also pending. The Dade County Circuit Court denied the petition on February 15, 1972 and Arison appealed this denial on March 13, 1972 to the Third District Court of Appeal. On October 18, 1972 the District Court of Appeal reversed the trial court, holding that the dispute should be arbitrated. The trial court correctly recognized that this decision ousted the receiver of jurisdiction and so informed the parties at a March 1, 1973 hearing.

Klosters sought and was granted certiorari by the Florida Supreme Court in the arbitration action. On

May 30, 1973, the Supreme Court of Florida reversed the District Court of Appeal, in effect reinstating the receiver. The Florida Supreme Court held the receiver should continue to function as he had already acquired jurisdiction and commented that, in any event, Arison's conduct subsequent to its petition for arbitration constituted a "waiver" of its right to arbitration. Arison promptly filed a petition for rehearing before the Florida Supreme Court. The petition asserted a denial of due process in the appointment of the receiver without notice (point 10 of the rehearing petition) and in the Florida Supreme Court's determining that Arison had waived its right to arbitration without giving Arison any opportunity to present evidence on this issue (point 8).

Throughout these proceedings Arison has thus raised at every available opportunity the questions it seeks to bring before this Court.[5] Arison in the receiver action contested the appointment of the receiver without notice before the trial court by assignment of error, before the Florida District Court of Appeal by appeal from the denial of this assignment of error and in its certiorari petition before the Florida Supreme Court.

No petition for certiorari was filed with this Court in the receiver action for the simple reason that such a petition would have been moot. Prior to the expiration of the time for filing a petition for certiorari the Florida District Court of Appeal issued its opinion in

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[5] Federal constitutional questions are properly before this Court when they have been seasonably raised in the state courts below. *Edelman* v. *California*, 344 U.S. 357 (1953); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

the arbitration action,[6] granting Arison's request for arbitration, ousting the receiver and therefore temporarily mooting the question of his appointment without notice. Klosters' petition for certiorari before the Florida Supreme Court did not raise the question of the appointment of the receiver without notice and Arison's response could not have raised this question.[7] Arison thus reasserted its constitutional questions at the next available opportunity, the petition for rehearing before the Florida Supreme Court, when it was first known that the receiver had been reappointed.

REASONS FOR GRANTING THE WRIT

I. Florida Rules of Civil Procedure 1.610 and 1.620, Which Are Similar To Those of Many Other States, Permit the Appointment of a Receiver Without Notice to the Affected Party. The Deprivation of Due Process Countenanced by These Rules Is a Matter of National Importance.

Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), have recently demonstrated this Court's continued fidelity to the basic proposition that a "fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Rule 1.610 of the Florida Rules of Civil Procedure permits the appointment of a receiver without notice to the affected party if "it is manifest from the allega-

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[6] The mandate of the Florida Supreme Court in the receiver action was issued August 7, 1972 and the opinion of the District Court of Appeal in the arbitration action was issued October 18, 1972, less than 90 days later.

[7] Klosters sought certiorari before the Florida Supreme Court pursuant to Rule 4.5(c)(6) of the Florida Appellate Rules. Under these rules, only the questions raised in the petition are considered by the Florida Supreme Court.

tions of a verified complaint . . . that the injury will be done if an immediate remedy is not afforded." Similar provisions permitting the appointment of a receiver without notice can be found in 26 other states. See Appendix E, *infra*. Such provisions require nothing more than a showing of "irreparable injury." Due process, however, requires that prior notice be given to the adverse party. See *Baldwin* v. *Hale*, 68 U.S. 223 (1864).

The right to be heard which is the essential element of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). In other words, the "right to a hearing is meaningless without notice." *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956). Notice and hearing are necessary to minimize arbitrary deprivations of property by testing the validity of claims for relief in the crucible of the adversary process. *Sniadach* v. *Family Finance Corp.*, *supra* at 343 (Harlan, J., concurring opinion). This Court has thus required that notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And the constitutionally required time and manner is prior to even a temporary deprivation of property. *Fuentes* v. *Shevin*, *supra* at 81-82.

While in "extraordinary situations" due process does permit judicial action without prior notice and hearing, such cases invariably involve both an important governmental interest and a special need for prompt action. See, *e.g.*, *Ewing* v. *Mytinger & Cassel-*

berry, Inc., 339 U.S. 594 (1950) (misbranded articles likely to cause injury); *Coffin Bros. & Co.* v. *Bennett*, 277 U.S. 29 (1928) (prevention of bank failures). Klosters' request for appointment of a receiver without notice served no important governmental interest; at stake was solely private gain and the opportunity to procure an unfair advantage over the adversary.

Since the Florida rule permits a deprivation of property merely upon an allegation of irreparable injury, the rule on its face violently conflicts with the dual due process demands of prior notice and hearing. This conflict appears in stark relief when measured by the facts of this case. Arison and Klosters had a long standing business relationship and had even shared office space. Klosters can demonstrate no sudden need for judicial intervention without notice when at least nine days prior to Klosters' request for a receiver its counsel had announced his intention to seek such relief. Surely there was no problem in locating Arison or its counsel when counsel for both parties were face to face the same day in federal court. There is but one explanation for Klosters' failure to give prior notice. The giving of notice would have permitted Arison to appear and contest the appointment of the receiver and would have thus deprived Klosters of the significant advantage of arguing without opposition. It is just such unfair advantage which the due process clause prohibits.

In sharp contrast to Florida Rule 1.610, Rule 65 of the Federal Rules of Civil Procedure—which does comport with constitutional norms—requires much more than an allegation of irreparable injury. Under Rule 65(b) a temporary restraining order can be granted without notice only if there is a showing of ir-

reparable injury *and* a statement of the attempts made to give notice and the reasons supporting the claim that notice should not be required. No federal court would have granted Klosters' request for the appointment of a without notice receiver. The statement required by Federal Rule 65(b)(2) would have disclosed that notice could be given with ease and without delaying the action. As Judge Lombard noted in *Arvida Corp.* v. *Sugarman,* 259 F.2d 428, 429 (2d Cir. 1958) (concurring opinion), notice must be given "when, with a few minutes' effort by telephone, it [the movant] can so easily notify the parties and their counsel to appear before the district judge for such hearing as may be necessary and desirable . . ." Federal Rule 65 thus itself demonstrates the unconstitutionality of the Florida rule and the similar rules of other states, and combines with the entirety of this Court's due process holdings to warrant a grant of certiorari.

II. The Florida Supreme Court's Announcement That Arison Had "Waived" Its Right To Arbitration Is a Denial of Due Process for the Announcement Constitutes the Resolution of a Contested Issue of Fact Without Providing an Opportunity for the Presentation of Evidence on That Issue.[8]

The Florida Supreme Court sua sponte determined that Arison had waived its right to arbitration. Arison's petition to compel artibration was denied by

[8] Arison readily concedes that this question is not—in contrast to the first question—a matter of national importance and thus would not normally satisfy the requirements for certiorari. The question is brought before this Court primarily to demonstrate that the Florida Supreme Court's waiver announcement cannot constitute an independent non-federal ground supporting the decision below for the waiver position itself was arrived at by unconstitutional means. See, e.g., *Demorest* v. *City Bank Farmers Trust Co.,* 321 U.S. 36, 42-43 (1944).

the trial court by granting Klosters' motion to dismiss. No testimony was taken by the trial court on the factual issue of waiver. On appeal to the Florida District Court of Appeal from the granting of the motion to dismiss, neither party even remotely discussed the issue of waiver. The question was first raised by Klosters in its petition for certiorari before the Florida Supreme Court.

This Court has long recognized that waiver is a fact question to be determined only on a fully developed record. See *Henry* v. *Mississippi,* 379 U.S. 443 (1965). Nonetheless, the Florida Supreme Court gave Arison no opportunity to introduce evidence as to whether its conduct constituted a waiver, a fact question which had not been raised at the trial or intermediate appellate levels. An appellate court cannot consistent with due process render its decision "on facts not contained in the record and on a theory which had never been tried by the litigants." *Helis* v. *Ward,* 308 U.S. 365, 370 (1940); *Cf. Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 (1965); *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). As Mr. Justice Black explained in *Cole* v. *Arkansas,* 333 U.S. 196, 202 (1948), "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Arison has been denied its right to have its case determined on the issues and evidence framed in the trial court and this denial violates due process.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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By: .....
Stephen N. Shulman

Certificate of Service

I, Stephen N. Shulman, a member of the Bar of this Court, do hereby certify that on the——day of November, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida, addressed to respondent's counsel of record as follows:

HERBERT L. NADEAU, ESQ.
PATTON, KANNER, NADEAU,
SEGAL & STOBS
150 S.E. Second Ave.
Miami, Florida 33131

.....
Stephen N. Shulman

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1973

Case No. 43,142

Knutsen Rederi A/S, a Norwegian Corporation,

Petitioner

v.

Anson Shipping Company, a Florida Corporation,

Respondent

Opinion Filed May 30, 1973

Writ of Certiorari to the District Court of Appeal,
Third District

Stuart W. Patton and [illegible] of Patton,
Ramsey, Nadeau, Segal, Stubbs & Zeller, for Petitioner

Eugene C. Holman of Holman & Cleary, for Respondent

APPENDIX

Certificate of Service

I, Stephen N. Shulman, a member of the Bar of this Court, do hereby certify that on the ___ day of November, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida, addressed to respondent's counsel of record as follows:

Honorable L. Nathan, Esq.
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150 S.E. Second Ave.
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Stephen N. Shulman

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1973

Case No. 43,142

KLOSTERS REDERI A/S, a Norwegian Corporation,
Petitioner,

v.

ARISON SHIPPING COMPANY, a Florida Corporation,
Respondent,

Opinion Filed May 30, 1973

Writ of Certiorari to the District Court of Appeal, Third District

Stuart W. Patton and Herbert L. Nadeau of Patton, Kanner, Nadeau, Segal, Stobs & Zeller, for Petitioner

Eugene C. Heiman of Heiman & Crary, for Respondent

McCAIN, J.

This cause is before this Court on conflict certiorari granted to review the decision of the Third District Court of Appeal, opinion filed October 18, 1972, and reported at 268 So. 2d 428, which purportedly conflicts with those cases hereinafter discussed. We have considered the cases cited for conflict and have determined that we have jurisdiction pursuant to Fla. Const. Art. V, § 3 (b)(3).

In this extremely complicated and complex case the Third District Court of Appeal reversed an order of the trial judge who had denied respondent's petition for compulsory arbitration in an essentially equity action.

Apropos is a review of the essentials in the case up to this time (our opinion).

Petitioner's sworn complaint alleged that Klosters Rederi A/S, a Norwegian corporation (hereinafter referred to as Klosters), doing business as Norwegian Caribbean Lines, owned and operated four deluxe cruise ships out of the Port of Miami; that on October 8, 1969, Klosters entered into a contract with Arison Shipping Company (hereinafter referred to as Arison), pursuant to which Arison was to act as ships agent for Klosters; that the contract contained provision for payment of costs and expenses with a profit participation; that provision was therein made for the depositing by Arison into the bank account of Norwegian Caribbean Lines of all sums received for advance tickets and reservations within 48 hours after receipt by Arison; that the contract contained provisions for termination and for arbitration of disputes arising under the contract; that the contract specified that the termination notice should not become effective until 30 days after notice in order to afford the offending party an opportunity to cure any alleged defaults; that on December 31, 1971, Klosters served a notice of termination upon Arison for breach of contract; and that the termination notice recited breaches by Arison of fiduciary duties imposed by the contract, including defalcations and misappropriation by Arison of funds belonging to Klosters and failure to attain the average net over-all profits called for by the contract.

Arison, on January 3, 1972, responded to the termination notice by denying any breach or wrongdoing and making demand upon Klosters for the payment of $400,000.00 as a partial payment on damages, pending a final accounting.

The sworn complaint for an accounting and other equitable relief filed February 2, 1972, was against Arison Shipping Company, a Florida corporation, Ted Arison, individually, Mr. Brain, Inc., a Florida corporation, Georgian Bay Lines, Inc., an Illinois corporation, The Carner Bank of Miami Beach, Pan American Bank of Miami and The Florida National Bank and Trust Company at Miami. The

named corporate defendants, apart from the banks, were subsidiaries of Arison.

The complaint also charged Arison with fraud, misappropriation of funds and breaches of fiduciary duties under the contract. The prayer was for the appointment of a receiver without notice to insure preservation of funds and records in the possession of Arison and for other extraordinary equitable relief.

Accompanying the complaint was a motion for the appointment of a receiver to which affidavits were attached delineating certain of the claimed misappropriations and defalcations. One of such affidavits was executed by the president of the defendant, Georgian Bay Lines, Inc., a corporation controlled by Arison. To enumerate the numerous alleged defalcations and misappropriations would serve no purpose at this time. Suffice it to say that the affidavits evidenced misappropriations by Arison approximating $1,000,000.00 during the month of January 1972 and *subsequent* to the termination notice.

Pursuant to the sworn complaint and the affidavits, a receiver was appointed without notice on February 2, 1972, and he has undertaken his duties and has recovered in excess of $1,500,000.00 of assets allegedly improperly in the custody of Arison and others.

The order appointing the receiver without notice was affirmed on appeal on March 28, 1972. Arison Shipping Company v. Klosters Rederi A/S, 264 So. 2d 425, Third District Court of Appeal.

The same day that the receiver was appointed, Arison also filed its petition to compel arbitration. The receiver was appointed and functioning prior to any hearing on Arison's petition to compel arbitration.

To Arison's petition for compulsory arbitration Klosters filed a response. Arison's petition for compulsory arbitration was denied by the same court that had appointed the receiver. Arison appealed this order.

While the appeal was awaiting perfection and argument, respondent filed a counterclaim wherein a jury trial was demanded. That counterclaim was not only against Klosters but against third parties who were not signators to the arbitration agreement, and upon motion the petitioner was permitted to file that counterclaim as a part of the record on appeal.

The Third District Court of Appeal on October 18, 1972, reversed the lower court and ordered compulsory arbitration. Arison Shipping Company v. Klosters Rederi A/S, 268 So. 2d 428.

In this posture, the case now appears before us for review.

Naturally, respondent's attempt to invoke compulsory arbitration (Florida Arbitration Code, Chp. 682, F.S.) is derived from the contract between the parties calling for arbitration. However, equally compelling in this case is that the trial court's appointment of a receiver was an extreme and unmistakable jurisdictional act by a court of equity, and the affirmance of the appointment was confirmation of the need and necessity for the equitable relief prayed for (not only as between the principal parties but also as to the other numerous named defendants).

In Flaherty v. Metal Products Corporation, Fla. 1955, 83 So. 2d 9, even though decided prior to adoption of the Florida Arbitration Code, the rationale was succinctly stated:

> ". . . Even if the clause be construed as a contract to arbitrate all further disputes, a question which we do not now decide, its existence could be no bar to the maintenance of the suit. . . ."

In Shearson, Hammill and Co. v. Vouis, Fla. App. 1971, 247 So. 2d 733, it was held that compulsory arbitration of issues of alleged *fraud, misrepresentation* and *breach of fiduciary duties* of stockbrokers was inconsistent with the policy and language of the Florida Securities Law, which

controls over the provisions of the Arbitration Code. Certainly, the Securities Law is inapplicable here, but *Shearson* also stated, by citing Cruger v. Allstate Insurance Co., Fla. App. 1964, 162 So. 2d 690, the following:

> ". . . This court refused to oust the Circuit Court in an equity matter, of its general jurisdiction by allowing arbitration, notwithstanding a statutory provision which attempted to create an exception to the well-settled doctrine that an agreement to arbitrate a dispute in the future will not be enforced as an attempt to oust the court's jurisdiction."

In addition to the *Flaherty, Shearson* and *Cruger* cases, supra, see also Moss v. Sperry, 140 Fla. 301, 191 So. 531, to the effect that equity is far better equipped to afford full and complete relief where third parties are involved and the action is founded upon fraud and breach of fiduciary duties with the additional requirement of a complicated accounting. Thus, in such an instance, a court of equity having acquired jurisdiction should proceed with an adjudication of all rights which otherwise would be determined in piecemeal fashion. This affords full and complete relief.

Sub judice, the complicated issues involved (including allegations of fraud), the presence of numerous third parties, coupled with the appointment of and action by a receiver and his affirmance of appointment upon appeal, compel this Court to conclude that it was error for the District Court of Appeal to compel arbitration.

We are also satisfied that Arison's conduct, subsequent to its request for arbitration, was inconsistent with its demand and constituted a waiver of any contractual right to arbitration. A party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right. Ojus Industries, Inc. v. Mann, Fla. App. 1969, 221 So. 2d 780; Cornell & Company, Inc. v. Barber & Ross Company, (C.A.D.C. 1966), 360 F. 2d 512.

Accordingly, the decision of the District Court of Appeal, herein sought to be reviewed, is quashed and this cause is remanded with directions to reinstate the order of the trial court denying compulsory arbitration.

It is so ordered.

CARLTON, C. J., ERVIN AND DEKLE, JJ., AND GALE, Circuit Judge, Concur

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APPENDIX B

Opinion

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1972

Opinion filed October 18, 1972. Case No. 72-299

An Appeal from the Circuit Court for Dade County, Francis J. Christie, Judge.

Heiman & Crary, for appellant.

Patton, Kanner, Nadeau, Segal & Stobs, for appellee.

Before BARKDULL, C.J., AND CHARLES CARROLL AND HAVERFIELD, JJ.

CARROLL, Judge.

By this appeal a party to a contract seeks reversal of an order of the circuit court of Dade County denying its petition to compel arbitration, filed under § 682.02 of the Florida Arbitration Code, Chapter 682 Fla. Stat., F.S.A. We find error and reverse.

It is disclosed that the parties hereto had entered into a written contract which contained an agreement for arbitration of controversies thereunder as follows:

> "16.1 In the event any differences or disputes arise between us in matters relating to this agreement, or emanating therefrom, the interpretation thereof, or the

consequences of the breach thereof, such disputes shall be arbitrated. Each of us shall appoint an arbitrator. If these arbitrators are unable to agree they shall select a third arbitrator. The award of a majority of the arbitrators shall be made a rule of court. If the arbitrators selected by each party are unable to select a third arbitrator, the disputes and differences shall be arbitrated under the new rules of the London Arbitration Association or such other association which we may agree upon in writing, whose award shall be made a rule of court. Klosters retains the right to insist on London Arbitration.

"16.2 Nothing contained in this paragraph shall be construed to prevent any party hereto from applying to any court of competent jurisdiction for the purpose of obtaining such preliminary relief as may be appropriate to maintain the status quo pending the arbitration proceedings provided for herein. Status quo shall mean the last peaceable noncontested condition existing at the time of arbitration."

One of the parties to the contract, Klosters Rederi A/S gave notice to the other, Arison Shipping Company, of election to terminate the contract for certain claimed breaches thereof by Arison. The latter promptly notified Klosters that it disputed the claimed breaches of contract and demanded arbitration. Upon refusal thereof by Klosters, Arison filed its petition to compel arbitration.

Section 682.02 Fla. Stat., F.S.A., provides as follows:

"Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such

> agreement or provision shall be valid, enforceable and irrevocable without regard to the justifiable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder."

In the order of the circuit court denying the petition to compel arbitration, no ground or reason was given why the court concluded that the disputes between the parties relating to the claimed breaches of the written contract were not subject to arbitration, in view of the above quoted agreement of the parties for arbitration of such disputes and the validity and enforceability conferred thereon by § 682.02 Fla. Stat., F.S.A.

In contending for affirmance of the order denying arbitration, the appellee argues that the provision contained in paragraph 16.1 of the agreement for arbitration in the written contract, to the effect that "Klosters retains the right to insist on London Arbitration," constitutes an agreement by the parties that the Florida law relating to arbitration shall not apply. In opposition thereto the appellant contends the provision relied on by the appellee is not, and does not purport to be an agreement between the parties that the Florida Arbitration Law shall not apply to their contract, and further argues that the provision allowing Kosters to elect or insist on "London Arbitration," relates only to an alternative method or format of arbitration which the parties agreed should be used therefor, if Klosters should so elect.

On weighing the arguments of the parties on that point we find merit in those of the appellant. Section 682.04 Fla. Stat., F.S.A., provides:

> "If an agreement or provision for arbitration subject to this law provides a method for the appointment of arbitrators or an umpire, this method shall be fol-

lowed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or if an arbitrator or umpire who has been appointed fails to act and his successor has not been duly appointed, the court, on application of a party to such agreement or provision shall appoint one or more arbitrators or an umpire. An arbitrator or umpire so appointed shall have like powers as if named or provided for in the agreement or provision."

Here, in the agreement of the parties relating to arbitration, a method or format was provided for, with a provision for another or alternative method, that of "London Arbitration," if one of the parties should so elect. Under § 682.04 Fla. Stat., F.S.A., the method or format initially prescribed in paragraph 16.1 of the agreement of the parties "shall be followed," or in the alternative if so elected by Klosters, the other method or format thereof "shall be followed." The inclusion in the agreement for arbitration of alternative methods of arbitration with right of a party to elect thereon, did not operate to nullify the agreement for arbitration,[1] nor did it constitute an agreement of the parties that the Florida Arbitration Law should not apply to their contract.

For the reasons stated we conclude that the petition of Arison Shipping Company should have been granted; and the order denying its petition to compel arbitration is hereby reversed.

---

[1] Bohlmann v. Allstate Insurance Company, Fla. App. 1965, 171 So.2d 23; Netherlands Insurance Company v. Moore, Fla. App. 1966, 190 So.2d 191.

APPENDIX C

Order

(Friday, August 10, 1973)

Respondent's Motion to Stay Issuance of Mandate is denied.

On consideration of the Petition for Rehearing filed by attorneys for respondent, and response thereto,

It Is Ordered by the Court that said petition be and the same is hereby denied.

Carlton, C.J., Ervin, McCain and Delke, JJ., and Gale, Circuit Judge, concur.

APPENDIX D

Lybrand, Ross Bros. & Montgomery
1200 First National Bank Building
Miami, Florida 33131

Internal Communication

Date: January 25, 1972

To: File—Klosters Rederi A/S

From: M. H. Hatfield

Subject: Klosters Rederi

Charge Number:

Messrs. Brinson, Patton, Hatfield and Sims met in Patton office for the purpose of "mutual updating."

LRB&M related data available to date re "float" and potential contract breach matters. Discussion ensued at length as to philosophy and theory behind float calculation. Emphasized point that having secured Levinson float calculation as of 9/30/71 appeared to be a great aid in that the other side was admitting that a debt exists, the amount

thereof (as reflected by ASC unaudited records at 9/30/71) and the theory of the calculation (with which Lybrand agrees). The aid is derived in that we have a starting point and presumably do not have to undertake the awesome task of supporting the Lybrand contention. Lybrand also advised that we were, however, isolating and identifying the change in the total float number as a result of the audit.

Patton advised that he has good authority to support the fact that ASC has been bleeding Kloster funds in Chicago and New York, beginning sometime in December and continuing through January, 1972. Patton also advised (first news of this to us) that he intended to go to court on Tuesday, 2/1/72, and petition for a receiver to take over operations and cash. In this connection, Lybrand is to testify on certain questions relating to our audit and findings. To ensure complete understanding and unequivocally clear communication, Lybrand requested that questions to be posed be set forth in writing and that our answers thereto be set forth in writing. Since complex accounting questions will be discussed, this was deemed appropriate so that there would be no surprises in court Tuesday as to Patton-Lybrand responsibilities.

APPENDIX E

Statutes or Rules Similar to Florida With Regard to Notice

State	Statute or Rule
Alabama	Ala. Code, Vol. 3, Title 7, § 1156
Alaska	Alaska Stats., § 09.40.240
Arkansas	Ark. Stat. Ann., § 63-101 *et seq.*
California	West Ann. Calif. Code, Civil Pro., § 564-570
Georgia	Ga. Code Ann., § 55-305

State	Statute or Rule
Idaho	Idaho Code, § 8-603
Indiana	Ind. Ann. Stat., Vol. 2, § 3-2602
Kansas	Kan. Stat. Ann., § 60-1304
Minnesota	Minn. Ann. Stat., Rule 23 of Civ. Pro.
Mississippi	Miss. Code, Vol. 2, § 1356
Missouri	Mo. Ann. Stat., Vol. 34, § 515-240-260
Montana	Mont. Rev. Code Ann., § 93-4402
Nevada	Nev. Rev. Stat., Vol. 2, § 32.010-020
New Hampshire	N. H. Rev. Stat. Ann., § 498:12
New York	McKinney's Cons. Laws Ann., Vol. 7B, §§ 6401-6405
North Dakota	N. D. Cent. Code Ann., Vol. 6, § 32-10-02
Ohio	Ohio Rev. Code Ann., § 2735.01-06
Oklahoma	Okla. Stat. Ann., § 1551-1559
Oregon	Ore. Rev. Stat., § 31.010-050
South Dakota	S. D. Comp. Laws, Vol. 7, § 21-21-6
Tennessee	Tenn. Code Ann., Vol. 5, § 23-104
Texas	Vernon's Civ. Stat. Ann., Vol. 7, Art. 2293
Utah	Utah Code Ann., Rule 66 of Civ. Pro.
Virginia	Va. Code, Vol. 2, §§ 8-735, 736
Wisconsin	Wisc. Stat. Ann., § 268.16 *et seq.*
Wyoming	Wyo. Stat. Ann., Vol. 2, § 1-990

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-738

ARISON SHIPPING COMPANY,
Petitioner,

vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN (CARIBBEAN) SHIPPING LINES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

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PATTON, KANNER, NADEAU, SEGAL, STOBS & ZELLER
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In the Supreme Court of the United States

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No. 73-738

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

FLORIDA APPELLATE RULES CITED

1.3 *Definitions*

"Throughout these rules unless the context or subject matter otherwise requires:

* * *

'*Rendition*' of a judgment, decision, order or decree means that it has been reduced to writing, signed and made a matter of record, or if recording is not required, then filed. A paper is deemed to be recorded when filed with the clerk and assigned a book and page number. Where there has been filed in the lower court

a timely and proper motion or petition for a new trial, for a rehearing, or other timely post-trial motion or petition permitted by the rules, the decision, judgment order or decree shall not be deemed rendered until such motion or petition is disposed of."

3.14 *Rehearing*

"a. *Time For.* Unless further time is allowed, rehearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court.

"b. *Contents of Petition.* The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based.

"c. *Service.* A copy of the petition shall be served upon the opposite party or counsel and proof of such service shall be transmitted to the Court with the petition. The petition for rehearing shall not be considered a part of the record in the cause, unless so ordered by the Court, or unless rehearing is granted. No oral argument will be allowed on the petition."

* * *

3.15 *Mandate*

"a. *Issuance of Mandate.* Unless the Court, by special order shall otherwise direct, the clerk, upon the expiration of 15 days from the decision or order, shall issue such mandate or process as may be directed by the Court. When a judgment of reversal is en-

tered which requires the entry of a money judgment on a verdict the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict.

"b. *Extension of Time for Issuance of Mandate.* If a petition for rehearing is filed in a cause, the time for the issuance of the mandate or other process shall be extended until the petition is denied, or, if granted, until the cause has been fully determined; provided, however, that the court may delay the issuance of its mandate upon terms and conditions to be imposed by it after denial of rehearing for good cause if such application be made at the time of filing the petition for rehearing."

STATEMENT OF THE CASE

Klosters Rederi A/S is a Norwegian corporation (hereinafter referred to as Klosters), which owns and operates cruise ships out of the Port of Miami. On October 8, 1969, Klosters entered into a contract with petitioner, Arison Shipping Company (hereinafter referred to as Arison) appointing Arison as general agent for Klosters in the promotion, advertising and general conduct of cruise business for the ships owned by Klosters and being operated under the name of Norwegian Caribbean Lines.

Under the contract all funds collected for sale of advance reservations were remitted by travel agents and the public to Arison with the contractual requirement that all gross revenues should be deposited in Norwegian Caribbean Lines' accounts in Miami area banks within 48 hours after receipt. Because of acknowledged misappropriations and commingling of Klosters' funds by Arison, differences

arose between Klosters and Arison concerning the use and conversion of the funds as well as Arison's failure to generate the minimum funds as profits to Klosters as provided in the contract.

The contract provided for termination by Klosters without cause, as well as for cause in the event of material breach. The contract also contained a provision for arbitration of disputes.

On December 31, 1971, Klosters terminated the agreement for cause in accordance with paragraphs 10 and 12 of the contract, the termination to become effective 30 days from date of the notice as required by the contract. That notice further recited the admissions by Arison as to the misuse of funds belonging to Klosters received as deposits on future cruises from various travel agents and the use by Arison of such funds to finance other business ventures which were independent of and unrelated to the contract with Klosters. The termination letter further recited that, as of November 1, 1971, Arison acknowledged the misuse of such funds in an amount in excess of $600,000.00.

Arison replied on January 3, 1972, denying any breach, denying Klosters' right of termination and demanding arbitration.

Application was first made to the Federal District Court on February 1, 1973, for the appointment of a receiver; and District Judge King entered a stay order[1] and set a hearing for the following day. Arison, through its attorneys, appeared and challenged successfully the jurisdiction of the court on the ground that no diversity existed. Judge King in his ruling authorized Klosters to withdraw the orig-

1. The arbitration paragraph in the contract between the parties provided that any party had the right to apply to any court of competent jurisdiction for the purpose of maintaining preliminary relief to maintain the status quo.

inal complaint from the court files of the United States District Court for the Southern District of Florida and to file the same in the state court.[2]

Klosters the same day filed the same detailed and sworn complaint and affidavits in the state court, seeking an accounting and appointment of a receiver and other extraordinary relief. Relief was sought not only against Arison but against other named defendants, requesting relief which could be afforded only in equity. Among such third parties were the banks in which Arison had deposited funds belonging to Klosters. These accounts were in the name of Arison.

The unchallenged affidavits showed that *after* the termination notice given by Klosters and *after* Arison's demand for arbitration, Arison defrauded and misappropriated $1,000,000.00 of funds received for advance tickets sales and deposits belonging to Klosters.

The complaint also alleged that the books, records, reservations and advance bookings, all of which were in the possession of Arison, were vital and essential to the operation of the ships after termination February 1, 1972, and that Klosters had posted a bond of $1,500,000.00 with the Federal Maritime Commission guaranteeing its performance of the operations of the cruises for which tickets and reservations had been sold.

It alleged Arison's refusal to deliver the books and records, and its refusal to furnish any information concern-

---

2. Judge King stated:

"The leave is granted to, insofar as I have authority to do so—leave is granted to the plaintiff to utilize the pleadings as they have filed herein interlineating in ink if need be the style of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida *for the immediate application of the same relief as they have here sought.*" (Emphasis added)

ing advance reservations, correspondence, accounts receivable, accounts payable to travel agents, profits, expenses or liabilities incurred by Arison with respect to the operation of the ships.

It also alleged that prior to termination notice given by Klosters on December 31, 1971, there were in existence specific escrow agreements, letters of credit, time deposits, certificates of deposit and other evidences of indebtedness from banks, trust companies and travel agents in the sum of $954,074.50, that these deposits and evidences of indebtedness were in the name of Arison in violation of the contract and that Arison refused to surrender these deposits and evidences of indebtedness.

The prayer of the complaint sought extraordinary relief by way of the appointment of a receiver without notice. The emergency application was predicated upon the sworn allegations that if notice were to be given, Arison would make further withdrawals from the bank accounts and destroy records and reservation data before the court could act. These facts were substantiated by Arison's *modus operandi* between January 1, 1972, and February 1, 1972, during the 30-day delay period required by the contract and *after* Arison's demand for arbitration.

Upon the foregoing sworn complaint and the affidavits, the Circuit Court appointed former Circuit Judge Ray H. Pearson as receiver without notice. The receivership was not of Arison but was limited to books, records, bank accounts and other assets alleged to belong to Klosters.

On the same day that the receivership proceeding (hereinafter referred to on occasion as "receiver case") was filed and the Circuit Court appointed a receiver, Arison filed a separate action to compel arbitration under the

Florida Statutes.[3] The arbitration proceeding (hereinafter referred to on occasion as "arbitration case") fell in a different division of the court; and in accordance with local rules, on February 11, 1972, on Klosters' motion, the arbitration proceeding was transferred to the division where the receivership action was pending.

Klosters filed an extended response to the petition to compel arbitration, particularly reciting the need for relief available only in equity, the appointment and functioning of a receiver and that remedies to right the wrongs alleged were not available by arbitration, but only in equity.

Thereafter, Klosters filed an amendment to that response upon learning that notwithstanding the receivership order on February 7, 1972, Arison made demand upon one of the travel agents to remit to Arison the sum of $48,000.00 representing matured ticketings for Klosters' ships.

Arison did not move for dissolution of the receivership but took an immediate appeal to the Third District Court of Appeal for the State of Florida claiming the order appointing the receiver violated Florida Rule of Civil Procedure 1.610 (but not claiming such rule was unconstitutional).

The normal, obvious and approved course of action is first to apply to the court for dissolution and then to appeal. In the absence of this the affidavits in support of the receivership are taken as true. Arison makes several incorrect and misleading statements in its petition for the writ, the principal one being that the failure to give notice was designed to deprive the Circuit Court of knowledge that another proceeding in that court had been filed to compel arbitration and that Klosters had been served with

3. That complaint is attached as Appendix "A".

process in the proceeding. Nothing could be farther from the true state of affairs. In the first place while the petition for arbitration was filed approximately one hour prior to the filing of the suit for appointment of a receiver, no assignment of that case was made until after the receiver had been appointed. This was in keeping with the rules of the Circuit Court that no assignment is made until after the close of business on the day of filing except for emergency assignments which are given a divisional assignment immediately upon filing.

Petitioner seeks to make much of the fact that it did not receive notice of the temporary stay in federal court nor the appointment of a receiver in the Circuit Court. The significant fact is that two different courts on two separate occasions examining substantially the same sworn pleadings and affidavits felt the situation was severe enough to act without notice to protect Klosters from further fraudulent misappropriations by Arison.

The order appointing the receiver was affirmed by the District Court of Appeal on March 28, 1972, Arison Shipping Company v. *Klosters Rederi A/S*, 259 So. 2d 784, *cert. denied*, 264 So. 2d 425 (1972). Arison raised no constitutional issue before the District Court of Appeal.

While petitioner makes several complaints concerning the proceedings in the trial court, petitioner never applied to the Circuit Court for any type of relief before taking an appeal of the order appointing the receiver.

Subsequent to taking the appeal, however, Arison made application to the court to fix a date for hearing on a motion to dissolve the receivership and the Circuit Court entered its order on April 13, 1972, scheduling the matter of dissolution of the receivership on its non-jury calendar commencing May 15, 1972 (Respondent's Appendix "B").

At a later hearing[4] Arison made oral application to the court to cancel the hearing date established for the motion to dissolve the receivership thereby withdrawing its oral motion to dissolve the receivership. An order cancelling the order was entered by the court on May 18, 1972 (Respondent's Appendix "C").

Arison following affirmance of the order appointing the receiver and after unsuccessful appeal from an order denying its motion to dismiss, not only filed an answer in the receivership action but also a counterclaim joining other persons as counter-defendants, who were not parties to the arbitration agreement. Demand was also made by Arison for jury trial. Upon Klosters' motion, that counterclaim was made a part of the record on appeal in the arbitration case.

The arbitration case was heard by the Circuit Court which had appointed the receiver on February 15, 1972, and the petition to compel arbitration was denied (Respondent's Appendix "D"). Arison appealed from that order. The assignments of error raised no constitutional question (Respondent's Appendix "E").

On October 18, 1972, the Third District Court of Appeal reversed, ordering compulsory arbitration. *Arison Shipping Company* v. *Klosters Rederi A/S*, 268 So. 2d 428 (1972). After obtaining leave until November 12, 1972, by court order on October 31, 1972 (Respondent's Appendix "F"), Klosters filed a timely petition for rehearing staying the issuance of mandate by the Third District Court of Appeal.[5] The petition for rehearing was denied on Novem-

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4. Subsequent to the denial by the District Court of Appeal of Arison's petition for rehearing on March 28, 1972, and prior to the denial of Arison's petition for certiorari on the appointment of the receiver without notice by the Florida Supreme Court on June 30, 1972.

5. Florida Appellate Rule 3.15(b).

ber 28, 1973. Klosters obtained an automatic stay of the Third District mandate compelling arbitration by the filing of a timely petition for certiorari to the Supreme Court of Florida. Certiorari was granted and the matter was argued before the Florida Supreme Court on the merits.

On May 30, 1973, almost one full year after it had denied writ of certiorari to Arison on the question of the appointment of a receiver without notice, the Florida Supreme Court quashed the reversal by the District Court of Appeal and remanded with directions to reinstate the order of the trial court denying compulsory arbitration. No federal question was raised or presented by Arison in the Supreme Court of Florida nor was any such question decided by the Florida Supreme Court in the arbitration case (nor for that matter in Arison's petition for certiorari in the receivership case).

In a petition for rehearing in the Florida Supreme Court in the arbitration case, Arison for the first time, in either case, attempted to raise the federal question. That petition accordingly raised a new posture not taken previously, and in contravention of the procedural appellate rule on rehearing.[6] Arison's petition for rehearing was denied and the mandate of the Florida Supreme Court issued on August 10, 1973.

Finally, it is extremely important to note, contrary to Arison's factual statement, that from February 2, 1972, through the present date the receiver has continued to function, holding in excess of $1,500,000.00 of assets allegedly improperly in the custody of Arison and others. Hence, the contention that the reversal by the Florida

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6. Florida Appellate Rule 3.14(b) provides in part: "The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted. . . ."

Supreme Court of the order compelling arbitration reinstated the receiver is pure fabrication since the receiver was never ousted from his office.

With reference to the designation of the parties, Arison Shipping Company was the sole plaintiff and appellant below. Consequently, the reference in the petition for writ to petitioners is inaccurate, as is the name of the respondent which should be d/b/a Norwegian Caribbean Lines.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Summary of Argument

I. The petition for writ raises no substantial federal question of national importance under 28 U.S.C. § 1257(3).

A. The appointment without notice of a receiver *pendente lite* in the receiver action was interlocutory and did not constitute a final order depriving Arison of a final right and was necessary to the relief requested by Klosters in the receiver action.

B. Petitioner did not petition for certiorari to review the decision of the Supreme Court of the State of Florida entered on the 30th day of June, 1972, refusing to review the decision of the District Court affirming the appointment of the receiver, and the time has long expired for reviewing that decision and it cannot be reviewed by seeking a review of the order denying compulsory arbitration.

C. The principal cases relied upon by Arison deal with summary statutory seizure remedies. They have no application to equitable actions where the receivership without notice was found to be necessary.

D. The validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 was not questioned by Arison in the receiver case.

E. The issue of the receiver was not moot at the time petition for certiorari could have been requested in the receiver case.

F. The validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 was not questioned in the arbitration case.

G. The petition for rehearing in the arbitration case is not part of the record before this Court.

II. The decision of the Florida Supreme Court in the arbitration case was based upon independent, non-federal grounds and did not involve any issue of due process.

ARGUMENT

I. The Petition for Writ Raises No Substantial Question of National Importance under 28 U.S.C. § 1257 (3).

A. The Appointment Without Notice of a Receiver Pendente Lite in the Receiver Action Was Interlocutory and Did Not Constitute a Final Order Depriving Petitioner of a Final Right and Was Necessary to the Relief Requested by Respondent in the Receiver Action.

Arison claims that the ex parte appointment of the receiver by the trial court in the receivership case arbitrarily deprived petitioner of property without due process of law. It should be borne in mind that the appointment of the receiver pendente lite was not for the business but was limited to receiving and preserving property and assets pending the outcome of the receiver case. The limited receivership order was interlocutory and not finally determinative of the petitioner's rights. There was consequently no Fourteenth Amendment violation. *12 Wright & Miller, Federal Practice and Procedure*, § 2983 at 27-28; *1 Clark, Receivers*, Third Edition 1959, § 82 at 124-125.

It should be noted that in federal court notice is not a mandatory requirement for the appointment of receivers either by rule or statute. See 28 U.S.C. § 754, § 959, and Federal Rule of Civil Procedure 66. A court of equity has always been held to have the power to appoint a receiver without notice when the giving of notice would defeat the very purpose of the receivership. *Arkansas Louisiana Gas Company* v. *Kroeger*, 303 F. 2d 129 (5th Cir. 1962), *cert. denied* 371 U.S. 887 (1962); *Tennessee*

Publishing Company v. *Carpenter*, 100 F. 2d 728 (6th Cir. 1938), *cert. denied* 306 U.S. 659 (1939). Whether or not the exigencies of the situation dictated the appointment of the receiver without notice was a matter within the sound discretion of the trial court.

In the receivership case the sworn complaint supported by affidavits alleged that Arison had converted funds of the respondent and that Arison was in a position to commit further misappropriations because substantial sums belonging to Klosters were in bank accounts in Arison's name. The giving of notice of the appointment of a receiver would have precipitated withdrawal of these large sums and afforded an opportunity for destruction of the books and records relating to passenger reservation lists which were essential to the operation of the ships.

Arison recognizes that notice is not required in extraordinary situations (Petition for Writ, pages 8-9), but discounts the facts of the receiver case as not constituting such an extraordinary situation. Nevertheless, the cases cited above stand for the proposition that the appointment of a receiver is within the discretion of a court of equity and reviewable only as to an abuse thereof. The appellate courts of the State of Florida have made such a review and found no such abuse. This Court will not review on certiorari orders grounded upon the exercise of judicial discretion. *Arkansas Louisiana Gas Co.* v. *Kroeger*, supra.

B. Petitioner Did Not Petition for Certiorari to Review the Decision of the Supreme Court of the State of Florida Entered on the 30th Day of June, 1972, Refusing to Review the Decision of the District Court Affirming the Appointment of the Receiver, and the Time Has Long Expired for Reviewing That Decision and It Cannot Be Reviewed by Seeking a Review of the Order Denying Compulsory Arbitration.

The decision of the Supreme Court in the receivership case became final on the 30th day of June, 1972. The time for seeking a review of that order has long since expired. A review of the receivership ruling of the Supreme Court of Florida by an abortive attempt to tie it to the arbitration decision is precisely what is being here attempted contrary to law and the rules of this Court. If the petitioner was going to seek review of that order it should have sought the writ by petition from that order and not wait until over a year later and seek to review it in an entirely different case which is not even a collateral proceeding.

C. Principal Cases Relied upon by Arison Deal with Summary Statutory Seizure Remedies. They Have No Application to Equitable Actions Where the Receivership Without Notice Was Found to Be Necessary.

Arison argues for an extension of this Court's decision in *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969) and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). These cases both involve summary statutory seizure remedies in actions at law. The case at bar involves an equitable action for breach of trust and fiduciary duties and for an accounting with the appointment of a receiver without

notice to preserve the books, papers and assets necessary to make any final equitable judgment enforceable. Klosters agrees that procedural due process applies as well to equitable actions as to actions at law. However, it is obvious that the nature of the relief sought in equity will at times necessitate that an equity court act without notice to preserve the *status quo* pending a final hearing. The legal actions of attachment and replevin considered by this Court in the *Sniadach* and *Fuentes* cases are summary statutory remedies wherein the writ issues as a matter of course by the clerk upon compliance with the statute.

In *12 Wright & Miller, Federal Practice and Procedure,* § 2983 at 28, the writers quote from *Clark on Receivers* as follows:

> "The appointment of a receiver without notice in exceptional cases does not violate the due process clause of the U. S. Constitution, because the appointment is primarily to receive and preserve the property. The appointment is interlocutory; it does not constitute a final order adjudicating a final right."

D. The Validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 Was Not Questioned by Arison in the Receiver Case.

In point of fact, Arison never questioned the constitutionality of Florida Rules of Civil Procedure 1.610 and 1.620 until the petition for writ to this Court.

Arison in its petition (pp. 7-8) admits the validity of the principle that constitutional defenses should be raised at the earliest possible time or be waived. Indeed, this Court in *Edelman* v. *California,* 344 U.S. 357 (1953), cited by Arison, refused to review the constitutionality

of a state vagrancy statute because the issue was first raised on appeal.

The earliest opportunity for attacking the validity of these rules occurred in the trial court in the receiver case where Rule 1.610 explicitly authorizes a motion to dissolve the receivership. Actually, Arison had the Circuit Court enter an order setting a motion for hearing on the dissolution of the receivership, but voluntarily withdrew its application for dissolution, thus waiving any lack of notice. Respondent's Appendices "B" and "C". See 65 *Am. Jur. 2d,* (Receivers), § 98 at 931-932.

Arison did not petition or move for dissolution of the receivership case in the trial court but rather took an interlocutory appeal. The validity of Rules 1.610 and 1.620 was not argued but rather Arison contended that the rules had been violated. Thus, on page 18 of petitioner's brief to the Florida District Court of Appeal in the receiver case, it states in part as follows:

> "The law requiring notice is so well settled and academic that we will not belabor it here. See: Rules 1.610 and 1.620, Fla. R.C.P.; . . . ."

E. The Issue of the Receiver Was Not Moot at the Time Petition for Certiorari Could Have Been Requested in the Receiver Case.

In an effort to excuse the failure to seek review by this Court of the decision of the Supreme Court of Florida refusing to review the decision of the Third District in affirming the appointment of the receiver, Arison argues that it was prevented from petitioning this Court for relief on the due process issue during the 90-day period for the filing of a petition for such a writ because the Florida District Court of Appeal in the separate and distinct arbi-

tration case had reversed the trial court and ordered compulsory arbitration. Arison looks upon this as an automatic ouster of the receiver and termination of the receivership. That result does not follow as compulsory arbitration is not incompatible with a receivership. The need for preservation of assets continued. The order of the District Court compelling arbitration may have furnished a basis for moving for dissolution of the receivership but that order, in an entirely different case, was not self-executing. Furthermore, Arison well knew that the respondent would petition the Supreme Court of Florida to review the arbitration decision. Indeed, since the receiver was holding property pending final decision affecting a number of parties (i.e. Ted Arison, Georgian Bay Lines, Inc., Mr. Brain, Inc. and three different banks) not involved in the arbitration case, the outcome of the arbitration case could not control the receiver case.

Further, in the receiver case, August 7, 1972, was not the proper date from which to measure the 90-day period in which to petition for writ of certiorari in this Court. June 30, 1972, the date the Florida Supreme Court rendered its decision in the receiver case, was the measuring date, since the Florida Supreme Court does not issue a mandate on denial of a writ of certiorari. The reference to the August 7, 1972, date as equivalent to the date upon which mandate was issued, therefore, is completely erroneous.

Rule 1.3 of the Florida Appellate Rules defines "rendition" of a judgment, decision, order or decree as the fact that "it has been reduced to writing, signed and made a matter of record, or if recording is not required, then filed." This appellate rule was amended in 1958 to delete the statement that "a judgment or decision of an appellate court shall not be deemed rendered until the mandate is issued". See "Author's Comment", Florida Appellate Rule 1.3, 32 *Florida Statutes Annotated* 15.

Even assuming that August 7, 1972, was the proper date from which to measure, within that period, on October 31, 1972, Klosters obtained an order of the District Court of Appeal extending until November 12, 1972, the time within which a petition for rehearing could be filed in that court regarding the decision on the arbitration. Respondent's Appendix "F".

Upon denial of Klosters' petition for rehearing by the District Court on November 28, 1972, respondent filed a petition for certiorari with the Florida Supreme Court within the 15-day period provided by Florida Appellate Rules, thereby obtaining an automatic stay of the mandate compelling arbitration. Hence, the question of direct attack on the receiver's appointment was never rendered moot by the arbitration decision of the District Court of Appeal.

F. The Validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 Was Not Questioned in the Arbitration Case at Bar.

In the arbitration case, which is the only case from which a petition for certiorari to this Court has been filed, lack of notice of the hearing on the appointment of the receiver was obviously not an issue to be considered in determining whether the parties should be required to arbitrate. The constitutional issue was not raised until Arison's petition for rehearing to the Florida Supreme Court. Even then Arison did not challenge the validity of the Florida Rules of Civil Procedure 1.610 and 1.620; it merely asserted that the denial of compulsory arbitration violated its rights under the Fourteenth Amendment. Arison now seeks to have this Court adjudicate the constitutionality of the Florida Rules of Civil Procedure 1.610 and 1.620 though that issue was not raised at any time.

The validity of Florida Rules of Civil Procedure 1.610 and 1.620 never having been drawn in question before the Florida appellate courts, this Court should not grant Arison's writ of certiorari on that issue. *New York ex rel. Brant* v. *Zimmerman*, 278 U.S. 63 (1928); *Street* v. *New York*, 394 U.S. 576 (1969). Even if the general reference in the motion for rehearing before the Florida Supreme Court in the arbitration case to the lack of due process in the appointment of the receiver is construed to call into question the validity of the above mentioned Rules of Civil Procedure, raising the question for the first time in the petition for rehearing comes too late for consideration by this Court. *Simmerman* v. *Nebraska*, 116 U.S. 54 (1885); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919); *Herndon* v. *Georgia*, 295 U.S. 441, rehearing denied 296 U.S. 661 (1935).

G. The Petition for Rehearing in the Arbitration Case Is Not Part of the Record Before This Court.

Florida Appellate Rule 3.14(c) explicitly states that a petition for rehearing does not become a part of the record unless the petition is granted or unless the Florida court so orders. In the case at bar, the petition was denied and the Florida Supreme Court did not order it made part of the record. Hence, the constitutional issue is not properly before this Court and certiorari should not be granted. *Wilson* v. *Cook*, 327 U.S. 474 (1946); *Wall* v. *Chesapeake & O. R. Co.*, 256 U.S. 125 (1921); *Citizens Nat. Bank* v. *Durr*, 257 U.S. 99 (1921).

The untimeliness of the assertion of the unconstitutionality for the first time in the petition for rehearing is especially true in view of the obvious violation of Florida Appellate Rule 3.14(b) which requires the petition for rehearing not assert a new ground from that taken in the original argument or briefs.

It is to be remembered that the receivership action and the arbitration proceedings were wholly separate and independent actions. The former was filed by Klosters and the latter by petitioner.

The attempted insertion of a constitutional issue into the arbitration case at the rehearing stage was obviously an attempt to bootstrap the constitutional issue into a case where it does not belong in an attempt to confer jurisdiction upon this Court.

II. The Decision of the Florida Supreme Court in the Case at Bar Was Based upon Independent, Non-Federal Grounds and Not upon a Denial of Due Process.

The decision of the Florida Supreme Court in the case at bar was based upon the well-founded principle that compulsory arbitration will not operate to oust a court of equity of jurisdiction where the action sounds in fraud and breach of trust and fiduciary duties. The validity of that principle does not depend upon the method by which the Florida court assumed jurisdiction.[7] Furthermore, equity had taken jurisdiction. It had appointed a receiver and the receiver was functioning. It is elemental that when equity assumes jurisdiction it assumes it for all purposes. Equity cannot be ousted of its jurisdiction, once assumed, by a contractual provision for arbitration.

The Florida Supreme Court's decision in the arbitration case at bar could as well have been handed down if the trial court in the receiver case had appointed a receiver after notice to all parties affected. It was not the manner of the assumption of jurisdiction by the equity court in the

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7. See opinion of Supreme Court of Florida and citations therein. *Petitioner's* Appendix "A".

receiver case that determined the decision in the arbitration case, but the fact of the assumption of jurisdiction.

That the Florida Supreme Court concluded in passing (at the end of its opinion) as a matter of law that petitioner had by its subsequent conduct in the receiver case waived its right to compulsory arbitration, does not obviate the fact that the Florida court's decision in the arbitration case did not evolve from any hearing where due process questions were at issue.

Since the Florida Supreme Court's decision in the arbitration case at bar rests on independent, non-federal grounds, this Court should not take jurisdiction. *Lynch* v. *New York*, 293 U.S. 52 (1934).

CONCLUSION

The exigencies of the situation dictated the appointment of a receiver without notice and the appointing court so found. That finding and the exercise of that discretion does not present a federal question and it should not be reviewed by this Court on certiorari. It was incumbent upon Arison to raise any due process argument in the receiver case, and having failed to do so, it may not do so in the arbitration case where the decision of the Florida Supreme Court does not rest at all upon matters of procedural due process. It was also incumbent upon Arison to seek any review of the receivership order in the receivership action. That order cannot be reviewed in the arbitration action which is wholly independent of the receivership proceedings. This is but an abortive attempt to seek review of an order which is no longer reviewable because of the passage of time.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

.....

HERBERT L. NADEAU, ESQ.

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150 S. E. 2nd Avenue
Miami, Florida 33131
Of Counsel

CERTIFICATE OF SERVICE

I, Herbert L. Nadeau, a member of the Bar of this Court, do hereby certify that on the ..... day of December, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing brief in opposition to petition for writ of certiorari to Supreme Court of Florida, addressed to petitioner's counsel of record as follows:

Cadwalader, Wickersham & Taft
Stephen N. Shulman
Robert T. Lasky
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Washington, D.C. 20036

Heiman and Crary
Eugene C. Heiman
Suite 500 Brickell Executive Tower
1428 Brickell Avenue
Miami, Florida 33131

.....

HERBERT L. NADEAU

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

NO. 72-2327

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTER'S REDERI A/S,
a Norwegian Corporation,
Defendant.

Petition to Compel Arbitration

Plaintiff, ARISON SHIPPING COMPANY, a Florida corporation, sues the Defendant, KLOSTER'S REDERI, A/S, a Norwegian corporation, and says:

1. On or about October 8, 1969, the parties entered into an agreement in writing, a copy of which is attached hereto and marked "Exhibit A".

Paragraph 16 of that agreement provides for arbitration pursuant to Chapter 682, Florida Statutes.

2. On or about January 3, 1972, Plaintiff made demand for arbitration pursuant to said agreement and said statute. "Exhibit B".

3. Defendant has failed and refused, and still fails and refuses to arbitrate the disputes described in "Exhibit B".

4. No substantial issue exists as to the making of the agreement attached as "Exhibit A".

5. All conditions precedent to the filing of this Petition, pursuant to Section 682.03, Florida Statutes, have been performed or have occurred.

WHEREFORE, Plaintiff prays the Court to summarily hear this Petition and to grant this Petition and application to compel arbitration.

DATED February 2, 1972.

Heiman and Crary, P.A.

Attorneys for Plaintiff
1150 S.W. First Street
Miami, Florida 33130
By /s/ Eugene C. Heiman

APPENDIX B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

CASE NO. 72-2342

KLOSTERS REDERI A/S, doing business as NORWEGIAN CARIBBEAN LINES,
Plaintiff,

vs.

ARISON SHIPPING COMPANY, a Florida corporation, et al.,
Defendants.

Order

Application having been made to the Court to fix a date for a hearing on a motion to dissolve the receivership, the Receiver having been heretofore appointed without notice, it is

ORDERED AND ADJUDGED that the matter of the dissolution of the receivership be and it is hereby scheduled as an item to be called on the Court's non-jury trial calendar commencing with the period May 15, 1972.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 13 day of April, 1972.

/s/ Francis J. Christie
Circuit Judge

Copies Furnished to:
Heiman and Crary, P.A.
Patton, Kanner, Nadeau, Segal & Stobs
Ray H. Pearson, Esq.
Paige & Catlin
Arnold Nevins, Esq.
William B. Roman, Esq.

APPENDIX C

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Case No. 72-2342
Judge Christie

KLOSTERS REDERI A/S, doing business as NORWEGIAN CARIBBEAN LINES,
Plaintiff,

vs.

ARISON SHIPPING COMPANY, a Florida corporation, et al.,
Defendants.

Order

Oral application having been made to the Court to fix a date for a hearing on a Motion to Dissolve the Receivership, the Court having set the same down for hearing on its non-jury calendar, and Defendants, at a subsequent hearing, having withdrawn said oral application, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the date for hearing of Defendant's Motion to Dissolve the Receivership heretofore fixed by this Court be and the same is hereby cancelled there being no written or oral Motion presently pending before this Court.

DONE AND ORDERED at Miami, Dade County, Florida this 18 day of May, 1972.

/s/ Francis J. Christie
Circuit Judge

Copies furnished to:

Attorneys for Defendants:
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APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 72-2327 Judge Christie

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTERS REDERI A/S, a Norwegian corporation,
Defendant.

Order Denying Arbitration

This cause came on to be heard upon the petition of the plaintiff to compel arbitration and the response of the defendant thereto and an amendment to the response. Upon argument of counsel and the Court being fully advised in the premises, it is upon consideration

ORDERED AND ADJUDGED that the plaintiff's petition to compel arbitration be and the same is hereby denied.

DONE AND ORDERED at Miami, Dade County, Florida, this 15 day of February, 1972.

/s/ Francis J. Christie
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 72-2327 (Christie)

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTERS REDERI A/S, a
Norwegian corporation,
Defendant.

Assignments of Error

Plaintiff, ARISON SHIPPING COMPANY, a Florida corporation, assigns as the errors on which it will rely on appeal the following:

1. The Court erred in entering the Order Transferring Division dated February 11, 1972.

2. The Court erred in entering the Order Denying Arbitration dated February 15, 1972.

Heiman and Crary, P.A.
Attorneys for Plaintiff
1150 S. W. First Street
Miami, Florida 33130

by: .....
Eugene C. Heiman, Of Counsel
Telephone: 377-0802

I HEREBY CERTIFY that a true and correct copy of the above Assignments of Error was mailed this 21st day of March, 1972, to PATTON, KANNER, NADEAU, SEGAL & STOBS, Attorneys for Defendant, 150 S. E. Second Avenue, Miami, Florida.

by: .....
Eugene C. Heiman, Of Counsel

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1972

TUESDAY, OCTOBER 31, 1972

CASE NO. 72-299

ARISON SHIPPING COMPANY,
a Florida corporation,
Appellant,

vs.

KLOSTERS REDERI A/S, a
Norwegian corporation,
Appellee.

Upon motion of appellee, it is ordered that the time to file petition for rehearing is extended up to and including November 12, 1972.

A True Copy

Attest:

/s/ Willard Herst
Clerk District Court of Appeal, Third District

cc: Patton, Kanner, Nadeau, Segal & Stobs
Heiman & Crary
/h